

5445

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Marc Boman PL 2

FILL: B-190667

DATE: February 22, 1978

MATTER OF: Montedoro-Whitney Corporation

DIGEST:

1. Allegations that protester's proposal was undervalued in evaluation and that awardee's proposal was nonresponsive are untimely filed with GAO when initially raised with contracting agency more than ten days after protester knew of its own point score and of alleged nonresponsiveness of awardee.
2. Recommendation made that Federal Procurement Regulations Staff consider modification of procedures to include preaward notice of unacceptability to unsuccessful offerors in appropriate circumstances.

Montedoro-Whitney Corporation (M-W) protests the evaluation of the proposal which it submitted in response to Request for Proposals No. 7-35213, issued by the Department of Commerce, for a remote water telemetry system.

The protester contends that under any reasonable assignment of points consistent with the solicitation's evaluation scheme, it should have received a minimum of 90 points (out of a possible 100). On October 7, 1977, the protester was advised by the contracting officer that it received a total of only 15 points and that award had been made to Progress Electronics which had received 88 points in the evaluation. On October 31, 1977, the firm filed a protest with the contracting officer concerning what it believed to be an arbitrary and capricious award. It also requested an "official hearing" which, though offered by the agency in the form of a "complete debriefing", was never accepted by the firm. On November 10, 1977, the firm filed a protest with our Office contending

B-190667

that its proposal was undervalued in the evaluation, that the awardee had indicated during the procurement that it was offering a prototype, rather than the required "off-the-shelf" item, and that the procuring agency had committed numerous improprieties in the conduct of negotiations.

In order to insure GAO consideration of a protest filed initially with a contracting agency, the initial agency protest must have been filed not later than 10 days after the basis for protest was known, 4 C.F.R. § 20.2(a) and (b)(2). Although the protester knew both its own point score and that of the awardee on October 7, it did not file a protest until October 31. As a protest was filed more than 10 days after the basis for protest was known, it is untimely and will not be considered on the merits. Similarly, the protester's contention that the awardee was nonresponsive for failing to offer an "off-the-shelf" item is also untimely in view of the fact that the protester knew of this basis for protest on or before October 7. [The only information which the protester states it learned after that date concerns alleged improprieties in the conduct of negotiations (e.g., alleged change in contract scope) and the fact that it was excluded from discussions conducted with those in the competitive range.]

Accordingly, the protest is dismissed.

Notwithstanding the untimeliness of M-W's contentions, several of its allegations merit brief comment. In its protest letter to our Office, M-W also contends:

"The Department of Commerce negotiated privately with the Awardee and reduced the scope of the contract down to \$190,000. None of the other bidders were given this opportunity."

As M-W did not avail itself of the contracting officer's November 4, 1977 offer of a complete debriefing [responding to M-W's request for an "official hearing"], M-W was not aware at the time of its protest that M-W had been ruled outside the competitive range along with seven other

H-190657

firms who submitted proposals. Upon hearing that discussions had been conducted with Progress Electronics and recognizing that no discussions had been scheduled for M-W, M-W apparently concluded that Progress Electronics was the only company so contacted. In fact, five companies were found to be within the competitive range and the Commerce Department states that discussions were held with all five firms.

Furthermore, the fact that the awardee's price was reduced to \$190,000 during discussions is, by itself, not probative of any impropriety in light of the fact that discussions frequently result in price reductions by offerors. Moreover, the protester has not specified either the nature or extent of the alleged reduction in the scope of work contemplated by the solicitation.

We have been advised by the Commerce Department that, although M-W had been found unacceptable in May 1977, it was not notified of this fact until the first week in October 1977. Although the Federal Procurement Regulations (FPR) do not require that unsuccessful offerors be notified, prior to award, that their proposals were not accepted, FPR § 1-3.103(b) (1964 ed.), we believe that such a practice may be advisable in a case such as this, where the time between receipt of proposals and award is substantial. (See, for example, Armed Services Procurement Regulation (ASPR) 3-508.2(a) (1977 ed.) which requires that prompt notice be given to offerors submitting unsuccessful proposals in procurements in excess of \$10,000, when the period of evaluation is likely to exceed 30 days and award is not imminent.)

Consequently, we are recommending to the Federal Procurement Regulations Staff that consideration be given to the modification of existing procedures to include pre-award notice of unacceptability to unsuccessful offerors in appropriate circumstances.

Milton J. Dembling
for Paul G. Dembling
General Counsel